



April 10, 2000

Mr. William T. Cornwell, III  
Attorney & Counselor at Law  
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OR2000-1403

Dear Mr. Cornwell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 134133.

The Uvalde Housing Authority (the "Housing Authority"), which you represent, received a request for several types of information regarding the Housing Authority's investigation of its executive director. Specifically, the requestor seeks: 1) any report read by the Housing Authority's attorney (the "attorney") to the Housing Authority's Board of Commissioners (the "Board") during the open session portion of a meeting that took place on January 26, 2000; 2) copies of any documents that the attorney used or relied on at the meeting in regard to his presentation to the Board concerning the investigation of the executive director; 3) copies of any underlying documents in the attorney's possession which formed the basis of his presentation to the Board during the open session portion of the meeting (this request item apparently refers to an orange notebook from which the attorney read during his presentation); and 4) copies of all statements for legal services from the attorney to the Housing Authority from October 1999, to the present. You state that the Housing Authority intends to release request-items 2 through 4 to the requestor. However, you claim that the information that is responsive to request-item 1 is excepted from required public disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that since the time that the governmental body received the request: (1) litigation has been pending or reasonably anticipated, and (2) the information at issue is related to that litigation. Gov't Code § 552.103; *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex.

App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>1</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

To show that litigation is reasonably anticipated in this case, you refer to a letter from the requestor, who is the executive director of the Housing Authority, stating that he would view any attempt by the Housing Authority Board to unilaterally reduce his contract salary as a breach of contract. We do not consider this statement to constitute concrete evidence that litigation is likely to ensue. Therefore, we find that you have not met your burden of showing that litigation has been either pending or reasonably anticipated since you received the request. Accordingly, the Housing Authority may not withhold any of the submitted information under section 552.103.

Section 552.107(1) excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). When communications from attorney to client do not reveal the client's

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<sup>1</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney's legal opinion or advice. Open Records Decision No. 574 at 3 (1990). In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.*

At issue here are two draft charts of legal notes, which you, as the Housing Authority's attorney, created. You have submitted the charts as Exhibits C and D. Exhibit C is a draft chart showing possible causes of action against the executive director, the applicable laws and contract provisions, and supporting facts. Exhibit D is a draft chart that shows comparisons between various posted notices of meetings with items that were actually discussed at those meetings. You explain that you gave these charts to the chairman and one of the commissioners of the Housing Authority after the meeting of January 26, 2000 adjourned. We have reviewed the submitted charts and find that they constitute attorney-client communications consisting of legal advice.

However, when a governmental body voluntarily discloses a significant portion of otherwise privileged material to a third party, the attorney-client privilege is waived. Open Records Decision No. 630 at 4 (1994) (citing Tex. R. Civ. Evid. 511). You explain that as the attorney representing the Housing Authority, you attended the meeting of January 26, 2000, at which there were closed as well as open portions where the executive director and his employment contract were discussed.<sup>2</sup> You state that during an open portion of the meeting, a commissioner addressed a question to you regarding the legal grounds for a determination that the executive director had breached his employment contract. You responded to the question by referring to the two submitted draft charts of your notes and explaining "a few causes of action and the related facts but not all of the issues under examination." Consequently, we find that you waived the attorney-client privilege under section 552.107 in regard to the information from the draft charts that you revealed during the open session of the meeting. The Housing Authority may only withhold the remainder of the submitted charts under section 552.107.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

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<sup>2</sup>You have submitted the posted notice and agenda of this meeting; however, the notice shows that the meeting was to take place on January 18, 2000. Because the wording of the notice and agenda corresponds with your and the requestor's arguments, we assume that it is the correct notice and agenda.

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.-Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald  
Assistant Attorney General  
Open Records Division

EJF\nc

Ref: ID# 134133

Encl: Submitted documents

cc: Mr. Rojelio P. Perez  
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(w/o enclosures)